

FOREIGN INTELLIGENCE SURVEILLANCE COURT

PROPOSED RULES OF PROCEDURE

(SUBMITTED FOR COMMENT)

I. Scope, Construction, and Amendment of Rules

Rule 1. Scope of Rules. These rules govern all proceedings in the Foreign Intelligence Surveillance Court (hereafter, “the Court”). Issues not addressed in these rules may be resolved under the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure.

Rule 2. Amendment. Any amendment to these rules shall be prescribed and promulgated in accordance with 28 U.S.C. § 2071.

II. Structure of the Court and Authority of Judges

Rule 3. Structure.

(a) **Composition.** In accordance with 50 U.S.C. § 1803(a), the Court consists of those United States District Judges appointed by the Chief Justice.

(b). **Presiding Judge.** The Presiding Judge is the Judge so designated by the Chief Justice.

Rule 4. Authority of the Judges.

(a). **Scope of Authority.** Each Judge of the Court may exercise the authority vested by the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 et seq. (“the Act”), including the authority to issue an Order approving electronic surveillance or a physical search, and such other authority, consonant with Article III of the Constitution and other statutes and laws of the United States, to the extent not inconsistent with the Foreign Intelligence Surveillance Act.

(b). **Authority to Refer Matters.** Except for matters involving a denial of an application for a Court Order, a Judge of the Court may refer any matter to another Judge of the Court with that Judge’s consent. If a Judge directs the government to supplement an application, that Judge may direct the government to present the next renewal of that application to that Judge. If a matter is presented to a Judge whose tenure on the Court expires while the matter is pending, the Presiding Judge shall re-assign the matter.

(c) **Publication of Opinion.** On request by a Judge and after consulting with other Judges of the Court, the Presiding Judge may direct that an Opinion be published. Before publication, the Opinion must be reviewed by the Executive Branch and redacted to conform with the restrictions on the disclosure of classified information.

III. Attorneys Authorized to Appear Before the Court

Rule 5. Licensing and Other Requirements for Attorneys. An attorney may appear on a matter with the permission of the Judge before whom the matter is pending. An attorney who appears before the Court must be a licensed attorney and a member, in good standing, of the bar of a federal court, except that an attorney who is employed by and represents the United States or any of its agencies in a matter before the Court may appear before the Court regardless of bar membership. All attorneys appearing before the Court must have the appropriate security clearances.

IV. Clerk's Office

Rule 6. Duties of the Clerk.

(a). Duties. The Clerk will support the work of the Court consistent with the directives of the Presiding Judge. The Presiding Judge may permit the duties of the Clerk to be delegated.

(b). Court Records.

(i). Maintenance of Court Records. The Clerk will: A) maintain the Court's docket and records — including records and recordings of proceedings before the Court — and the seal; B) accept all documents for filing; C) keep all records, pleadings, and files in a secure location, making those materials available only to persons authorized to have access to them; and D) perform any other duties, consistent with the usual powers of a Clerk of Court, as the Presiding Judge may authorize.

(ii). Release of Court Records. Except for Orders or Opinions provided to the government when issued, no Court records or other materials may be released without prior motion to and Order by the Court.

(c). Electronic Filing. The Clerk, when authorized by the Court, may accept and file applications, Orders, and other filings electronically.

V. Form and Filing of Applications for Court Orders

Rule 7. Form of Applications for Court Order.

(a). Compliance With the Foreign Intelligence Surveillance Act. A federal officer may file an application for a Court Order in accordance with the Foreign Intelligence Surveillance Act. The application must be approved and certified in accordance with the Act. The application must contain the statements and other information required by the Act.

(b). Citations. Each application must contain citations to pertinent provisions of the Act or any other basis for the information contained in it.

(c). Facsimile or Digital Signatures. With the Judge's consent, an application may be submitted by any reliable electronic means, including facsimile.

Rule 8. Time of Submission; Applications.

(a). Time of Submission. An application must be submitted at least seven calendar days before the date of the scheduled hearing. The federal officer's written oath or affirmation, and the approval and certification required by the Act, may be submitted later, but no later than two hours before the scheduled hearing. The Court may, for good cause shown, excuse an untimely submission.

(b). Notice of Changes. The government may submit an amended application, but it must identify any differences from previous submissions at the time the Court reviews the final application.

Rule 9. New Matters; Supplementation.

(a). Notice to the Court. If an application or other request for action involves an issue not previously before the Court — including, but not limited to, novel issues of technology or law — the applicant must inform the Judge of the nature and significance of that issue.

(i). Memorandum Relating to New Technology. Prior to requesting authorization to use a new surveillance or search technique, the government must submit a memorandum to the Court which: (A) explains the technique; (B) describes the circumstances of the likely use of the technique; (C) discusses legal issues apparently raised by the technique; and (D) describes proposed minimization procedures to be applied to the use of the technique. At the latest, the memorandum must be submitted as part of the first application that seeks to employ the new technique.

(ii). Legal Memorandum. If an application or other request for action raises an issue of law not previously considered by the Court, the government must submit a memorandum of law in support of its position on each new issue. At the latest, the memorandum must be submitted as part of the first application that raises the issue.

(b). Correction of Material Facts. If the government discovers that a submission to the Court contained a misstatement or omission of material fact, the government, in writing, must immediately inform the Judge to whom the submission was made of: (i) the misstatement or omission; (ii) any necessary correction; (iii) the facts and circumstances relevant to the misstatement or omission; (iv) any modifications the government has made or proposes to make in how it will implement any authority granted by the Court; and (v) how the government proposes to dispose of or treat any information obtained as a result of the misstatement or omission.

(c) Disclosure of Non-Compliance. If the government discovers that any authority granted by the Court has been implemented in a manner that did not comply with the

Court's authorization, the government, in writing, must immediately inform the Judge to whom the submission was made of: (i) the non-compliance; (ii) the facts and circumstances relevant to the non-compliance; (iii) any modifications the government has made or proposes to make in how it will implement any authority granted by the Court; and (iv) how the government proposes to dispose of or treat any information obtained as a result of the non-compliance.

(d). Supplementation. The Court may require the applicant to furnish any information the reviewing Judge deems necessary for an informed review of that application and any proposed Orders relating to it.

Rule 10. Motions. Unless the Judge who issued an Order granting the application directs otherwise, a motion to amend the Order need not be presented to the Judge who issued it. But the Judge to whom a motion is presented may refer the motion for review and determination to the Judge who ruled on the application.

Rule 11. Applications Following Approval of Emergency Surveillance.

(a). Notification. A Judge who has been notified of the emergency authorization of electronic surveillance, physical search, or pen register/trap and trace surveillance pursuant to 50 U.S.C. § 1805(f), § 1824(e), or § 1843, may refer the consequent application to another Judge of the Court.

(b). Hearings. Except as authorized by the Judge who will hear the matter, hearings on applications consequent to emergency authorization shall be added to a regularly scheduled Court session.

VI. Hearings

Rule 12. Hearings.

(a). Scheduling. The Judge to whom an application is presented shall set the time for the hearing unless the Court sets a hearing schedule. The Judge has the discretion to adjourn the hearing.

(b). Ex Parte. Except as provided for under Rule 14, all hearings shall be ex parte and conducted in a secure location and manner.

(c). Appearances. Unless excused, the official supplying the information upon which an Order is sought and an attorney for the applicant must attend the hearing, along with other representatives of the government as the Court may direct or permit.

(d). Testimony; Oath; Recording of Proceedings. The Judge may take testimony under oath and receive other evidence. The testimony may be recorded electronically or as the Judge may otherwise direct.

VII. Orders

Rule 13. Contents.

- (a). **Citation.** All Orders must contain citations to pertinent provisions of the Foreign Intelligence Surveillance Act.
- (b). **Denying Application.**
 - (i). **Written Statement of Reasons.** If a Judge denies an application, the Judge must immediately prepare and file a written statement of each reason for the decision and cause a copy of the statement to be served on the government.
 - (ii). **Submission of Previously Denied Applications.** When a Judge denies an application, further submission of the application may be made only to that Judge.
- (c). **Approving Application; Expiration Date.** The expiration date and time of an Order approving an application must be computed on the basis of calendar days, not judicial business days, and must be stated as Eastern Time. Expiration dates must be computed from the date and time of the Court's issuance of an Order, or, if applicable, of the Attorney General's exercise of emergency authorization pursuant to 50 U.S.C. §§ 1805(f), 1824(e), or 1843.
- (d). **Electronic Signatures.** The Judge may sign the Order by any electronic means, including facsimile.

Rule 14. Enforcement; Sanctions.

- (a). **Show Cause Motions.** If a person or entity served with a Court Order (the “recipient”) fails to comply with that Order, the government may move the Court for an Order to show cause why the recipient should not be held in contempt and sanctioned accordingly. The motion must be filed with the Clerk of the Court and referred to the Judge who entered the underlying Order.
- (b). **Proceedings.**
 - (i). An Order to show cause must confirm issuance of the underlying Order, schedule further proceedings, and afford the recipient an opportunity to show cause why the recipient should not be held in contempt.
 - (ii). Proceedings on motions and Orders to show cause must be *in camera*. All records of such proceedings must be maintained in conformance with 50 U.S.C. § 1803(c).
 - (iii). If the recipient fails to show cause for noncompliance with the underlying Order, the Court may find the recipient in contempt and enter any further Orders it deems necessary and appropriate to compel compliance and to sanction the recipient for noncompliance with the underlying Order.
 - (iv). If the recipient shows cause for noncompliance or if the Court concludes that the underlying Order should not be enforced as issued, the Court may enter any further Orders it deems appropriate.

Rule 15. Returns; Time for Filing; Contents.

(a). Time for Filing.

(i). Search Orders. Unless otherwise ordered by the Court, a return must be made following the issuance of a Search Order either at the time of submission of a renewal application or within ninety days of the execution of a Search Order, whichever is sooner.

(ii). Other Orders. The Court may order the filing of other returns at a time and in a manner as it deems appropriate.

(b). Contents. The return must: (i) notify the Court of the execution of the Order; (ii) describe the circumstances and results of the search or other activity, including where appropriate an inventory; (iii) certify either that the execution was in conformity with the Order, or, if not in conformity, describe any deviation in execution from the Order and explain the reasons for any deviation; and (iv) include any other information as the Court may direct.

VIII. Sequestration or Destruction

Rule 16. Sequestration or Destruction. If the government submits material for sequestration, the Presiding Judge may order the government to file a memorandum stating the circumstances of the material's acquisition, reasons for the request to sequester rather than destroy the material, and any other information as the Presiding Judge may direct. The Presiding Judge may direct the Clerk to keep the material, specifying the terms and conditions of its retention, or order the Clerk or the government to destroy the material.

IX. Appeals

Rule 17. Motion to Transmit Record. The government may file an appeal within 60 days of the denial of an application. Upon filing the appeal, the government must file a motion to transmit the record to the Foreign Intelligence Surveillance Court of Review (hereafter, "Court of Review").

Rule 18. Transmission of the Record. The Court must transmit the record under seal to the Court of Review as expeditiously as possible, and no later than 30 days after the government's motion. A copy of the Judge's statement of reasons denying the application must be included as part of the record on appeal.

Rule 19. Statement of Reasons. The Judge whose decision is the subject of the appeal must file a statement of reasons before the record is transmitted to the Court of Review.

Rule 20. Oral Notification to the Court of Review. The Clerk must orally notify the Presiding Judge of the Court of Review immediately upon receipt of a motion from the government to transmit a record to the Court of Review.